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No. 97-29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF TEXAS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF STATE APPELLANT

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49 pp

QUESTION PRESENTED

In 1995, the State of Texas submitted changes to its Education Code to the Department of Justice (the "DOJ") for preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Although the state believed that the sanctions provisions of the Education Code, which provided the Commissioner of Education with the ability to hold deficient school districts accountable, are not changes affecting voting, DOJ disagreed, and precleared Texas Education Code § 39.131(a)(7) and (a)(8) as enabling legislation. Because Texas disagreed with the DOJ's over-expansive interpretation of the scope of § 5, Texas later filed a declaratory judgment suit in federal district court seeking a determination that § 39.131 (a)(7) and 39.131(a)(8) were not subject to § 5 preclearance, because they did not constitute a change affecting voting. In the alternative, Texas sought a declaratory judgment that the preclearance provisions of § 5 do not apply to actions taken pursuant to the federal Improving America's School Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"). The district court dismissed Texas' suit on the grounds that Texas' claims were not ripe. The question presented is:

Is a state's claim that an amendment to a statute is not subject to the preclearance requirements of § 5 of the Voting Rights Act ripe, when the United States Attorney General has precleared the statute as "enabling" legislation, but the State has taken no action under the "enabling" legislation?

PARTIES TO THE PROCEEDING

Plaintiff

The State of Texas

Defendant

The United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution

Statutes

Regulations

OPINION BELOW

The unreported opinion of the three-judge district court is set out in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a-10a. The court's order is at J.S. App. 11a-12a. The amended opinion of the three-judge district court, which is identical to the original opinion, but contains the signatures of all three participating judges, is set out at J.S. App. 13a-23a. The court's amended order is at 24a-25a.

Jurisdiction

The judgment of the United States District Court for the District of Columbia was entered on March 5, 1997. An amended judgment, signed by all three judges, was filed on March 17, 1997. The State filed a notice of appeal to this Court on April 23, 1997, J.S. App. 26a-27a, and filed a supplemental notice of appeal on May 12, 1997. J.S. App. 28a-29a. This Court has jurisdiction under 42 U.S.C. § 1973c and 28 U.S.C. § 2101(b).

Constitutional and Statutory Provisions Involved

The relevant federal statutory provisions are: the Voting Rights Act, 42 U.S.C. § 1973c; the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"); Goals 2000: Educate America Act, 20 U.S.C. § 5801 *et seq.*; and the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*

The relevant state statutory provisions are Texas Education Code, §§ 39.131(a) and (e). The relevant state and federal statutes are set out at J.S. App. 49a-92a.

Statement of the Case

Texas, like all states, has a substantial interest in the education of its children. Recognizing that "[a] general diffusion of knowledge [is] essential to the preservation of the liberties and rights of the people," Texas has made it "the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1. Article VII, § 3 of the Texas Constitution provides in part that "the Legislature may also provide for the formation of school district[s] by general laws." Texas has one thousand fifty-eight (1,058) school districts, each run by a school board elected from the school district. The schools are financed through a combination of state funding and local taxes raised by the school districts. The State Board of Education,[1] which is composed of fifteen (15) members elected statewide from single member districts, is responsible for developing the curriculum required of all Texas schools,[2] setting high school graduation requirements,[3] adopting textbooks for purchase with state funds,[4] and implementing a statewide assessment program.[5] The Commissioner of Education ("the Commissioner"),[6] as head

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[1] *See generally* TEX. EDUC. CODE §§ 7.101-7.112.

[2] TEX. EDUC. CODE § 28.002.

[3] TEX. EDUC. CODE § 28.025.

[4] TEX. EDUC. CODE § 31.024.

[5] TEX. EDUC. CODE § 39.022.

[6] *See generally* TEX. EDUC. CODE §§ 7.051-7.057.

of the Texas Education Agency ("TEA")[7] and Executive Secretary to the State Board of Education, is charged with implementing and enforcing state and federal education law and State Board of Education requirements, including sanctions under Chapter 39 of the Texas Education Code. Public schools in Texas are thus the joint responsibility of the local school districts and the state.

A. The Educational Reforms of 1993

In 1993, the Texas Legislature made "significant educational reforms in Chapter 35 of the Texas Education Code, entitled 'Public School System Accountability.'" *Edgewood Indep. School Dist. v. Meno*, 917 S.W.2d 717, 728 (Tex. 1995). The Supreme Court of Texas described the reforms in Chapter 35 in the following terms:

> In this Chapter, the Legislature defines the contours of its constitutional duty to provide a "general diffusion of knowledge" by articulating seven public education goals. These goals emphasize academic achievement. Most notably, the Legislature envisions that all students will have access to a high quality education and that the achievement gap between property-rich and property-poor districts will be closed. The Legislature has established a system of student assessment and school district accreditation to measure each district's progress toward meeting these goals. Districts that chronically fail to maintain accreditation standards are subject to penalties...

Edgewood, 917 S.W.2d at 728-729 (citations omitted).

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[7] *See generally* TEX. EDUC. CODE §§ 7.021-7.024.

The legislature empowered the Commissioner to ensure that all schools in the state are providing a quality education to Texas children while meeting the requirements of federal and state law. Thus, each school district must account for its failures to the Commissioner and the Commissioner will recognize each school district for its successes. The accountability regime was established at the same time that the Texas Legislature completely revised the state's school finance system, which had three times been held unconstitutional by the Texas Supreme Court. *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Edgewood Indep. School Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Carrollton-Farmers Branch Indep. School Dist. v. Edgewood Indep. School Dist.*, 826 S.W.2d 489 (Tex. 1992). That Court subsequently found the new school finance system constitutional, relying in part on the accountability system as meeting the legislature's constitutional requirement to provide for a general diffusion of knowledge statewide. *Edgewood*, 917 S.W.2d at 730. ("The accountability regime set forth in Chapter 35, we conclude, meets the legislature's constitutional obligation to provide for a general diffusion of knowledge statewide.") The State did not submit these amendments to Chapter 35 for preclearance because it did not believe that these were changes with respect to voting within the meaning of § 5 of the Voting Rights Act.

B. The 1993 Reforms are Challenged and the Texas Legislature Responds

In 1995, private plaintiffs and the United States independently brought § 5 challenges to the Commissioner's appointment, pursuant to Chapter 35, of a management team to a deficient school district. *Casias v. Moses*, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995), *dismissed as moot*, No. SA-95-CA-0221 (W.D. Tex. Jan. 16, 1996), and *United States v. Moses*, No. SA-95-CA-275 (W.D. Tex. 1995). The Commissioner appointed the management team because "a

volatile and potentially violent situation existed that threatened the day-to-day operations of the district and was likely to 'spill over into the schools impacting the learning environment and endangering student and staff safety.'" Jt. App. 24. Plaintiffs alleged that because the provision authorizing the Commissioner to appoint a management team was a change affecting voting, it was subject to the preclearance requirements of § 5 of the Voting Rights Act. In its order granting plaintiffs a preliminary injunction, the three-judge panel expressed concern that placement of a management team could constitute a *de facto* replacement of an elected school board with an appointed authority. Jt. App. 27. The court was particularly concerned with the "broad authority given the management team." Jt. App. 28. The court enjoined the State from implementing Chapter 35 until it was precleared. Jt. App. 29-30.

In 1995, the Texas Legislature completely rewrote the Texas Education Code by passing Senate Bill 1 ("S.B. 1"). S.B. 1 enacted a comprehensive deregulation of public education in exchange for clearly defined standards of accountability. In direct response to *Casias*,[8] Section 39.131(e) was amended specifically to ensure that the sanctions in § 39.131(a)(7) and (8), providing for the temporary placement of a master or management team, would not implicate the Voting Rights Act. J.S. App. 46a. Section 39.131(e) specifically limits the authority of the master or management team and provides that any placement is temporary. J.S. App. 91a.

C. A Summary of the Legislative Response: Chapter 39

Texas law decrees that all students attending Texas public schools must "demonstrate exemplary performance in the reading and writing of the English language . . . in the

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[8] The *Casias* court issued its preliminary injunction on May 11, 1995. The Texas Legislature passed S.B. 1 before it adjourned on May 29, 1995.

understanding of mathematics . . . in the understanding of science . . . [and] in the understanding of social studies." TEX. EDUC. CODE § 4.002. In order to insure that these goals are met, the legislature erected a comprehensive system that holds public schools and school districts accountable for student academic performance. TEX. EDUC. CODE §§ 39.021-131.

Chapter 39 contains, *inter alia*, a detailed legislative prescription for the assessment of academic skills, §§ 39.021-033,[9] for the development of performance indicators, §§ 39.051-.054,[10] for the determination of accreditation status, §§ 39.071-.076,[11] and for the imposition of accreditation sanctions,

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[9] Subchapter B, entitled "Assessment of Academic Skills," establishes the use of statewide tests that are administered to all Texas public school children at different points in their education. These tests are known as the "Texas Assessment of Academic Skills," or "TAAS" tests. The purpose of these tests is "to ensure school accountability for student achievement that achieves the goals provided under Section 4.002." TEX. EDUC. CODE § 39.022.

[10] Subchapter C entitled "Performance Indicators," requires the State Board of Education to establish "indicators of the quality of learning on a campus." TEX. EDUC. CODE § 39.051(a). "The indicators must be based on information that is disaggregated with respect to race, ethnicity, sex, and socioeconomic status and must include," *inter alia*, the results of the skills assessment test, dropout rates, student attendance rates, the percentage of graduating students that pass exit-level skills assessment test, the percentage of graduating students who meet the course requirements for the recommended high school program established by the State Board of Education, and the results of the Scholastic Assessment Test (SAT) and the American College Test (ACT). TEX. EDUC. CODE § 39.051(b).

[11] Subchapter D, entitled "Accreditation Status," provides for "rules to evaluate the performance of school districts and to assign to each district a performance rating" of (1) exemplary, (2) recognized, (3) academically acceptable, or (4) academically unacceptable. TEX. EDUC. CODE § 39.072(a).

§ 39.131.[12] The ultimate goal of Chapter 39 is to measure the academic performance of Texas school children and to reward those schools and school districts that achieve the legislative goals or to sanction those schools or school districts that fail to achieve the legislative goals.

More specifically, § 39.131(a) of Chapter 39 of the Texas Education Code authorizes the Commissioner to impose sanctions on a school district in several circumstances in which the school district does not satisfy the accreditation criteria found at §§ 39.071-39.076. First, the Commissioner may impose sanctions upon a district based upon a lowered or unimproved accreditation rating where an annual review of academic performance reveals unacceptable performance by a subgroup for which data is disaggregated as to race, ethnicity, sex, or socioeconomic status under §§ 39.073 and 39.051(b).[13] Second, the Commissioner is authorized to impose sanctions upon a district where an investigation discloses violations of federal law or regulations regarding federally-required or funded programs. TEX. EDUC. CODE § 39.074. Finally, the Commissioner is authorized to impose sanctions on a district

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[12] Subchapter G, entitled "Accreditation Sanctions," *inter alia*, provides the Commissioner with a list of sanctions, increasing in severity, that he may impose on school districts that do not satisfy the accreditation criteria established by §§ 39.071-.076. TEX. EDUC. CODE § 39.131(a).

[13] *See supra* footnotes 9 and 11. Students are tested by a state administered exam and school districts are rated according to the performance of students in that district on the exam. The exam results are disaggregated by the ethnicity of students in the district and the district is held accountable for the performance of each group. For example, a school district in which a high proportion of African-American students failed the math portion of the exam is designated as low-performing based solely on the performance of this group of students. This regimen forces the school district and the state to focus on ways to increase the performance of all student groups. This procedure has worked; it has resulted in increased performance by all student groups statewide since its inception.

where an investigation discloses a violation of the state's accountability system, required accounting and financial practices, excessive alternative placements of students, violation of civil rights or other federally-imposed requirements, or of the legally-established roles of superintendent and board of trustees. TEX. EDUC. CODE § 39.075.

The sanctions options available to the Commissioner include: (1) issuance of a public notice of the deficiency to the board of trustees; (2) ordering a hearing conducted by the board of trustees of the district to notify the public of the unacceptable performance, the improvements in performance expected by the agency (TEA), and the sanctions that may be imposed if the performance does not improve; (3) ordering the preparation of a student achievement improvement plan that addresses each academic excellence indicator for which the district's performance is unacceptable, submission of the plan to the Commissioner for approval, and implementation of the plan; (4) ordering a hearing to be held before the Commissioner or his designee at which the president of the board of trustees and the superintendent of the district shall appear and explain the district's low performance, lack of improvement, and plans for improvement; (5) arranging an on-site investigation of the district; and, (6) appointing an agency monitor to participate in and report to the agency on the activities of the board of trustees or superintendent. TEX. EDUC. CODE §§ 39.131(a)(1)-(6).

Other sanctions available to the Commissioner include: (7) appointing a master to oversee the district's operations; (8) appointing a management team to direct the operations of the district in areas of unacceptable performance or requiring the district to obtain certain services under contract with another person; (9) appointing a board of managers composed of residents of the district to exercise the powers and duties of the board of trustees if a district has been rated academically unacceptable for a period of one year or more; and (10) annexing the district to one or more adjoining districts, or

requesting the Board of Education to revoke a district's home-rule school district charter, if a district has been rated as academically unacceptable for a period of two years or more. TEX. EDUC. CODE § 39.131(a)(7)-(10).[14]

The Commissioner may impose sanctions on a school district "to the extent the Commissioner determines necessary." TEX. EDUC. CODE § 39.131(a). However, § 39.131(c) requires

> ... the commissioner [to] review annually the performance of a district or campus subject to this section to determine the appropriate actions to be implemented under this section. The commissioner must review at least annually the performance of a district for which the accreditation rating has been lowered due to unacceptable student performance and may not raise the rating until the district has demonstrated improved student performance. If the review reveals a lack of improvement, the commissioner shall increase the level of state intervention and sanction unless the commissioner finds good cause for maintaining the current status.

TEX. EDUC. CODE § 39.131(c).

The flexibility to choose different sanctions as needed allows the Commissioner to deal quickly and effectively with problems that jeopardize the education of Texas children in a particular school district.

TEA policy requires first the imposition of sanctions that do not include the appointment of a master or management team. In fact, most interventions begin and end with a required

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[14] The sanctions contained in § 39.131(a)(7) and (a)(8) are the issue in this action; sanctions (9) and (10) are not in issue in this action.

improvement plan, § 39.131(a)(3), a hearing, § 39.131(a)(4), or the presence of a monitor, § 39.131(a)(6). Nonetheless, the appointment of a master or management team for a short time period as provided by § 39.131(a)(7) and (8) and as limited by § 39.131(e) gives the Commissioner the necessary tools with which to deal with serious problems that threaten the educational process in a district.

When the Commissioner appoints a master or management team to oversee the operations of a school district, the Commissioner must clearly define their powers and duties. TEX. EDUC. CODE § 39.131(e). The Commissioner does not have free rein, however. These duties are expressly limited by state law. A master or management team may: (1) direct an action to be taken by the principal of a campus, the district superintendent, or the district's board of trustees; and (2) approve or disapprove any action of the campus principal, the district superintendent, or the district's board of trustees. TEX. EDUC. CODE § 39.131(e)(1), (2). However, a master or management team cannot take any action concerning a district election, including ordering or canceling an election or altering the date of, or the polling places for, an election; changing the number, or method, of selecting the board of trustees; setting a tax rate for the district; and adopting a budget for the district that provides for spending a different amount, exclusive of required debt service, from that previously adopted by the board of trustees. TEX. EDUC. CODE § 39.131(e)(3)-(6).[15]

The elected board of trustees is not displaced during the time the master or management team is in place. The school board continues to meet and make decisions. It continues to have all the authority with which it is vested by Chapter 11 of

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[15] The Texas Legislature imposed these prohibitions to ensure specifically that the sanctions in § 39.131(a)(7) and (8), providing for the temporary placement of a master or management team, would not implicate the Voting Rights Act. *See, e.g., Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992).

the Education Code except in those areas of deficiency that led to the temporary appointment of the master or management team. In these special areas of deficiency, the master or management team is authorized to act in a manner that will correct the specific deficiency. Moreover, under § 39.131(e), the Commissioner must evaluate the continued need for the master or management team every 90 days. The appointment, by law, is not permanent. Unless that evaluation indicates that continued appointment is necessary for effective governance of the district or delivery of instructional services, the master or management team must be removed. *Id.* Moreover, a party that disagrees with the Commissioner's appointment of a master or management team has a right to appeal the Commissioner's action to the district court of Travis County, Texas located in Austin, Texas. TEX. EDUC. CODE § 7.057(d). This procedure provides an aggrieved party the opportunity of contesting and overturning the Commissioner's appointment in a state district court.

D. DOJ Preclears Chapter 39

On June 12, 1995, Texas submitted S.B.1 to the United States Department of Justice ("DOJ") for administrative preclearance under § 5 of the Voting Rights Act and asked for expedited review because "many of the over 1,000 school districts in Texas will need to proceed as soon as possible in order to implement various provisions of the Act for the 1995-1996 school year." J.S. App. 45a. Texas did not believe that the sanctions provisions of § 39.131(a)(1)-(10) constituted election-related changes.[16] However, DOJ instructed the State

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[16] The State's view was based on the belief that the legislature's amendments to Chapter 39 made clear that the appointment of a master or management team was not election related. Thus, the State's preclearance letter stated:

that, in its opinion, some of the sanctions provisions were changes affecting voting.[17] Although the State disagreed with this opinion, it nonetheless submitted the information requested by DOJ in order to obtain a quick resolution. J.S. App. (Vol. 2) 93a-102a

DOJ agreed with Texas that the sanctions under § 39.131(a)(1)-(6) are not voting changes subject to preclearance under § 5 of the Voting Rights Act. They are not in issue here. However, DOJ determined that the sanctions under § 39.131(a)(7) and (8) were changes affecting voting and precleared them only as enabling legislation.[18] J.S. App. 35a-38a. By preclearing these two sanctions provisions as enabling

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> In our opinion, as the permanent elective structure of the board of trustees is not altered by these temporary emergency procedures, neither this section nor the management team procedures in Section 39.131(e) are election-related, and do not require preclearance; nevertheless, we bring these sections to your attention for your consideration.

J.S. App. 33a.

[17] The DOJ's letter to the State asserted that

> Chapter 39 authorizes the Commission or the Texas Education Agency to *indefinitely replace* an elected or consolidated school board with an appointed special master, management team, board of managers, etc., that will exercise the school board's power.

Jt. App. 33 (emphasis added). This letter requests more information concerning Chapter 39. Jt. App. 39.

[18] DOJ also determined that Texas must obtain preclearance in each instance it imposes sanctions under § 39.131(a)(9) and (10). J.S. App. 37a-38a. These sanctions provisions, however, are not at issue in this case.

legislation,[19] DOJ required Texas to obtain preclearance of each and every decision by the Commissioner to appoint, pursuant to § 39.131(a)(7) and (8), a master or a management team to oversee the operations of a school district that does not satisfy the accreditation criteria. J.S. App. 37a-38a.

E. Texas Becomes an Ed-Flex Partnership State

In January 1996, Texas was selected as one of seven Ed-Flex Partnership states, pursuant to the Educational Flexibility Partnership Demonstration Act ("Ed-Flex"), 20 U.S.C. § 5891 *et seq*. *See* Letter from Richard W. Riley, Secretary, United States Department of Education, to Michael A. Moses, Commissioner of Education, with attachments (Jan. 26, 1996), J.S. App. 39a-48a. Ed-Flex provides that the Secretary of Education may authorize state educational agencies in eligible states to waive federal statutory or regulatory requirements applicable to certain federal programs. 20 U.S.C. § 5891(e)(2), 20 U.S.C. § 5891(e)(4)(B)(ii). One of the programs whose statutory requirements can be waived is Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*, which includes corrective actions that a state must take against a school district that fails to make adequate progress towards meeting the state's student performance standards. 20 U.S.C. § 6317(d)(6)(A).

Because Texas is designated as an Ed-Flex partner, it may waive federal education regulations and statutory requirements, and replace them with its own regulations. 20 U.S.C. § 5891(e)(4)(B)(ii). As an Ed-Flex Partnership state, Texas substituted its accountability provisions, including the sanctions listed in § 39.131(a), for the provisions of federal law. 20 U.S.C. § 5891(b)(1). In other words, § 39.131(a)(7) and (a)(8) are sanctioned by Congress' federal education laws.

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[19] *See* 28 C.F.R. § 51.15.

F. The Lawsuit Below

On June 7, 1996, Texas filed its complaint under the Voting Rights Act, 42 U.S.C. § 1973c, seeking a declaratory judgment that the temporary placement of a master or a management team under §§ 39.131(a)(7) and (8) as limited by § 39.131(e) of the Texas Education Code is not a change affecting voting. In the alternative, Texas sought a declaratory judgment that the preclearance provisions of § 5 of the Voting Rights Act do not apply to actions taken pursuant to the Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex").

Texas requested a three-judge panel pursuant to 28 U.S.C. § 2284 and 42 U.S.C. § 1973c. The district court accepted jurisdiction on July 15, 1996, and appointed a three-judge panel on July 22, 1996. Texas then moved for summary judgment. The United States filed a motion to dismiss. After briefing by the parties, the three-judge panel granted the United States' motion to dismiss on March 5, 1997, on the grounds that the case was not ripe for judicial review. J.S. App. 11a-12a; J.S. App. 24a-25a.[20] Texas filed its jurisdictional statement on June 23, 1997. The United States filed its Motion to Affirm on August 28, 1997. This Court noted probable jurisdiction on September 29, 1997.

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[20] The court filed an amended order on March 17, 1997, signed by all three-judges. Except for the signatures of all three-judges, the amended order is identical to the original order, and the amended memorandum opinion is identical to the original memorandum opinion. Cites to the Appendix are to the amended memorandum opinion.

Summary of Argument

This case presents purely legal issues. What Texas seeks here is no different from what the appellants sought in *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992): a legal determination of whether certain provisions of state law are changes affecting voting under § 5 of the Voting Rights Act. Texas asks for a declaratory judgment that §§ 39.131(a)(7) and (8) as limited by § 39.131(e) of the Texas Education Code, which allow for the temporary placement of a master or management team with circumscribed powers, are not a change affecting voting and, therefore, need not be precleared pursuant to § 5 of the Voting Rights Act. No facts are needed to make this legal determination.

The district court erred in dismissing Texas' declaratory judgment action for lack of ripeness. First, the district court erroneously concluded that the case was not ripe under Article III because the State's injuries were "not sufficiently imminent to create a justiciable controversy." J.S. App. 18a. In so ruling, the Court ignored the damage to federalism that results whenever DOJ erroneously requires a state to seek preclearance of legislation that is not a change affecting voting. This damage to its interest in federalism gives Texas standing to complain of DOJ's erroneous conclusion that a provision of Texas law is a change affecting voting that requires preclearance under § 5. This Court in *Allen v. State Board of Elections*, 393 U.S. 544, 562 (1969), recognized that a justiciable controversy arises from the preclearance procedures of § 5 because of "[t]he clash between federal and state power and the potential disruption to state government ... There is no less a clash and potential for disruption when the disagreement concerns whether a state enactment is subject to § 5."

Second, the district court erroneously ruled that the case did not meet the prudential ripeness doctrine articulated in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), in which this Court ruled that for a case to be ripe it must both be

fit for judicial decision and must not impose an undue hardship on the parties. The district court held that the claims presented by Texas--albeit raising purely legal questions--were not fit for judicial decision because "the 'actual contours of [each appointment order] will be determinative of' whether an elected board is displaced *or its powers in any way diminished.*" J.S. App. 19a. The district court's explanation of why the legal question was not fit for judicial decision manifests that the district court assumed the question it was asked to answer: whether the provisions in issue are ones that affect a change in voting or "election law." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 501 (1992).

Finally, the court also held that Texas would not suffer undue hardship if judicial review were withheld, ruling that seeking preclearance each time the Commissioner places a master or management team is not "so unwieldy as to deny Texas a meaningful opportunity to expeditiously implement its statutory scheme." J.S. App. 21a. Once again, the district court ignored the damage to federalism that results from requiring a state to seek preclearance when such is not required. Moreover, the Court ignored the fact that the delay caused by the preclearance process would adversely affect the ability of the Commissioner to correct serious problems in a school district. This Court ruled in *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) that "[c]hanges which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." *Id.* at 506. That is precisely what the Texas Legislature has done in §§ 39.131(a)(7), (a)(8), and (e): it has authorized the Commissioner to appoint, for a limited time period, a master or management team with circumscribed powers to address grievous problems that adversely affect the education of the children in the troubled school district.

DOJ's over-expansive and unsupportable application of § 5 of the Voting Rights Act in this case interferes with, and disrupts, this system of accountability. In essence, DOJ's

position, if upheld, will have a predictable result: the denigration of federalism by this unwarranted intrusion into the "routine matters of [state] governance." *Presley*, 502 U.S. at 507.

In short, the district court's opinion simply begged the question; it assumed that voting rights were involved:

> Congress has made the decision that the protection of voting rights outweighs any other State concerns. It is Congress which has struck the balance in favor of preclearance to protect voting interest over school district changes to improve the education process.

J.S. App. 21a.

Moreover, the district court did not address Texas' claim that actions taken pursuant to the Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"), do not require preclearance. The federal government, through its Department of Education, contributes funding to Texas public schools. In return for accepting those funds, the State agrees to abide by the requirements of federal education law. Texas has done this. Moreover, Texas is one of the few states that is an Educational Flexibility Partnership state. As such, it has opted, pursuant to federal law, to utilize its own accountability measures rather than the federal ones.[21]

Texas asks this Court to reverse the judgment of the court below and to render a decision on the merits: one that declares that §§ 39.131(a)(7), (a)(8), as limited by (e), are not

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[21] But for the fact that it is an Educational Flexibility Partnership state, Texas would be obligated under federal law to impose sanctions on deficient school districts under circumstances delineated by federal education law.

changes affecting voting and, therefore, do not have to be submitted for preclearance under § 5 of the Voting Rights Act.[22]

ARGUMENT

I.

TEXAS' CLAIMS ARE RIPE FOR JUDICIAL REVIEW

The district court dismissed Texas' claim on the grounds that it did not meet either the constitutional or prudential requirements of ripeness. The district court erred in that determination.

A. Article III Ripeness Exists

Although the district court ruled that the State's claims were not ripe for judicial decision under Article III, the essence of the ruling was that the State had no standing to sue on these claims. Article III standing exists when a plaintiff can show, first, that he has "suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent,' 'not conjectural' or

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[22] In *Perkins v. Matthews*, 400 U.S. 379, 386-387 (1971), this Court decided that

> ... in the interest of judicial economy, we shall not remand to the District Court for the making of a properly limited inquiry. The record is adequate to enable us to decide whether the challenged changes should have been submitted for approval and we shall, therefore, decide that question.

Texas asks this Court to follow this procedure in this case.

'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Second, "there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court." *Id.* Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.*

The district court premised its conclusion that Article III ripeness did not exist on two of the State's asserted injuries: (1) that the quality of education of all Texas school children would be diminished and (2) that it will suffer an inability to move promptly and efficiently to safeguard the education of its children. Missing from the district court's consideration of the State's injuries was the argument that the State's direct and immediate injury was to its interest in federalism: a right to be free from unwarranted federal interference into "the routine matters of [state] governance." *Presley*, 502 U.S. at 507; Texas' Response to United State's Motion to Dismiss, or, in the Alternative, for Judgment on the Pleadings at 7; Texas' Motion for Summary Judgment at 17; *see generally* Texas' Reply to the Defendant's Opposition to Texas' Motion for Summary Judgment.

This case is similar to *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656 (1993). In *Jacksonville*, an equal protection case, this Court ruled that the injury in fact in an equal protection case is the denial of the plaintiff's constitutional right to equal treatment. *Id.* at 666. Similarly, the injury in fact in this case is Texas' constitutional right to be free from unwarranted federal intrusion into routine matters of state governance. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), this Court recognized the importance of having a dispute over the question of whether a state enactment is subject to § 5 heard by a three-judge panel. *Id.* at 562. It is incomprehensible indeed that this issue, which merits resolution by a three-judge panel, would be deemed by the district court to

be of such little consequence to Texas that its action would be dismissed for lack of standing.

In short, the district court erred. Texas' interest in federalism is a legally protected one under our Constitution. Texas has standing to bring this declaratory action because DOJ's erroneous ruling that §§ 39.131(a)(7), (a)(8), and (e) are subject to preclearance under § 5 made the State's injury concrete, particularized, and actual. That concrete, particularized, and actual injury resulted directly from DOJ's erroneous ruling. A favorable decision from the Court that those provisions are not election related and, therefore, need not be precleared would redress the State's injury. Thus, Article III standing exists.

B. Prudential Ripeness Exists

Prudential ripeness is governed by a two-part test. First, the Court must consider the "fitness of the issue for judicial decision." Second, the Court must consider "hardship to the parties of withholding court consideration." *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967). Consideration of both factors indicates that this case is ripe.

1. The issue whether §§ 39.131(a)(7), (8), and 39.131(e) are changes affecting voting is fit for judicial determination because the issue is a purely legal one.

Ripeness and standing share the constitutional requirement that an injury in fact be certainly impending. Here, the injury in fact is actual. Texas has enacted legislation that DOJ has erroneously deemed to be election related and, therefore, must be precleared. Texas disagrees with DOJ's legal assessment and seeks a determination that this legislation need not be precleared because it is not election related and, therefore, not subject to § 5 of the Voting Rights Act. Texas

asks this Court to construe a statute. Questions of statutory interpretation are independent of any factual dispute. In *Abbott Laboratories v. Gardner*, this Court held that whether the Food and Drug Commissioner had correctly interpreted a statute was fit for judicial determination because the "issue tendered is a purely legal one." 387 U.S. at 149.

Moreover, the impact of the DOJ's decision that the particular placement of a master or a management team must be precleared "is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage" because the decision "put [the State of Texas] in a dilemma." *Abbott Lab. v. Gardner*, 387 U.S. at 152. Either the State complies with the preclearance requirement wrongfully imposed by DOJ and subjects routine matters of state government--here, the Commissioner's decision to appoint a master or management team to troubled school districts--to federal supervision, or it refuses to comply with the preclearance requirement and risks time consuming litigation that will encumber the State's ability to address problem school districts quickly. *Id.*

Nor must the Court wait until Texas makes a specific placement of a master or management team to ascertain the authority given the master or management team. As discussed below, the limitations on a master's or management team's authority are codified at TEX. EDUC. CODE § 39.131(e). No factual determinations are necessary for a court to decide whether the appointment of a master or management team exercising the limited powers authorized by the statute constitutes a change affecting voting. In short, a court can render a declaratory judgment based on its purely legal assessment that §§ 39.131(a)(7), (a)(8) and (e) are not changes affecting voting subject to § 5 of the Voting Rights Act.

Further, as explained more fully below, Texas' claims under the Improving America's Schools Act, 20 U.S.C. § 6301, *et seq.*, as modified by the Educational Flexibility Partnership Demonstration Act ("Ed-Flex"), 20 U.S.C. § 5801 *et seq.*, are purely legal ones, and not dependent on facts. That issue is

whether the Voting Rights Act applies to state action taken pursuant to a federal statute.

a. The Voting Rights Act covers only changes directly relating to voting.

Congress passed the Voting Rights Act in 1965, to "implement[] Congress' firm intention to rid the country of racial discrimination in voting." *Allen v. State Board of Elections*, 393 U.S. 544, 548 (1969). Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires that an affected state[23] or subdivision seek preclearance of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

While the scope of § 5 is broad, it is not universal. To some extent, "[e]very decision taken by government implicates voting . . . yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 504 (1992). In *Presley*, this Court noted that "[o]ur cases since *Allen* reveal a consistent requirement that changes subject to § 5 pertain *only* to voting." *Id.* at 502 (emphasis added). Further, the "[c]overed changes must bear a *direct* relation to voting itself." *Id.* at 510 (emphasis added).

In *Presley*, this Court reviewed the history of cases under § 5 of the Voting Rights Act, and identified four types of changes that were covered by § 5:

> First, we have held that § 5 applies to cases like *Allen v. State Board of Elections* itself, in which the changes involved the manner of voting. . .

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[23] Texas is subject to the Voting Rights Act. *See* 42 U.S.C. § 1973b(b). *See also* 28 C.F.R. § 51 app. (1995).

> Second, we have held that § 5 applies to cases like *Whitley v. Williams*, which involve candidacy requirements and qualifications. . . Third, we have applied § 5 to cases like *Fairley v. Patterson*, which concerned changes in the composition of the electorate that may vote for candidates for a given office. . .Fourth, we have made clear that § 5 applies to changes, like the one in *Bunton v. Patterson*, affecting the creation or abolition of an elective office. . .

502 U.S. at 502-503 (citations omitted).

The Court further noted that "[t]he first three categories involve changes in election procedures," while "[t]he fourth category might be termed substantive changes as to which offices are elective." *Id.* The Court refused to extend the reach of the Voting Rights Act to "changes in the routine organization and functioning of government." *Id.* at 504.

b. The provisions authorizing the Commissioner to place a master or management team with circumscribed powers to oversee the operations of a school district for a limited time period are not subject to the Voting Rights Act because they are not a change affecting voting, but simply a change in the routine organization and functions of government.

The provisions of the Texas Education Code providing for the temporary placement of a master or management team do not fall within any of the categories recognized by this Court in *Presley, supra*. First, the provisions have no effect on election procedures. Independent school districts continue to

be governed by an elected board of trustees. TEX. EDUC. CODE § 11.151. Moreover, §§ 39.131(a)(7) and (8) do not change the requirements for candidates to the board, the composition of the electorate that votes for the board, or the manner of voting for the board. TEX. EDUC. CODE § 39.131(e)(3), (4).

Nor do §§ 39.131(a)(7) and (8) constitute "substantive changes as to which offices are elective." *Presley*, 502 U.S. at 503. This category was first described in *Bunton v. Patterson*, 393 U.S. 544 (1969). In *Bunton*, Mississippi amended its statutes to provide that in certain counties, the superintendent of education would no longer be elected, but would be appointed by the board of education. *Allen*, 393 U.S. at 550-551. The Court held that such a change was subject to § 5 preclearance, because it affected the power of a citizen's vote. *Id.* at 569. The voter is "prohibited from electing an officer formerly subject to the approval of the voters." *Id.* at 569-70.

Bunton is distinguishable from this case because §§ 39.131(a)(7) and (8), providing for the temporary placement of a master or management team, do not change an elected office to an appointed one. The elected board of trustees is not being replaced; it continues to exist and to exercise all its authority subject to oversight by a master or a management team with circumscribed power during a limited time period. Voters continue to elect members of the board of trustees just as they did prior to enactment of Chapter 39. *See generally* TEX. EDUC. CODE §§ 11.051-11.063. Instead, §§ 39.131(a)(7), (a)(8) and (e) provide only that certain of the board's responsibilities may be supervised temporarily by a master or management team due to the board's demonstrated inability to correct problems that adversely affect the education of the school children in the district. Indeed, Texas law proscribes a replacement of the board of trustees with a master or management team in the *Bunton v. Patterson* sense, that is, a change from "an elective office to an appointive one." *Presley*, 502 U.S. at 507. Section 11.051(a) of the Texas Education Code specifically states that "[a]n independent school district is

governed by a board of trustees who, as a body corporate, shall oversee the management of the district."

This case is similar to *Presley v. Etowah County Comm'n*, in which this Court held that changes that affect only the allocation of power among governmental officials are not considered changes affecting voting. *Presley*, 502 U.S. at 510. *Presley* involved changes in county commissioners' responsibilities in the Alabama counties of Etowah and Russell. Voters in Alabama counties elected members of county commissions, which were responsible for the maintenance and construction of county roads. In Etowah county, an individual commissioner could at one time authorize expenditures of funds allocated to his district without the approval of the entire commission. In 1987, however, the commission passed a "Common Fund Resolution" which discontinued that practice when it put all monies in a common fund. Similarly, in Russell County, individual commissioners could authorize expenditures for routine maintenance and repair work without approval from the entire commission. This authority was changed in May 1979, when the commission passed a resolution transferring control over road construction, maintenance, personnel, and inventory from the commissioners to the county engineer, a person appointed by the entire commission ("Unit System"). The state legislature later passed legislation implementing both the common fund and the unit system resolutions. Neither the resolutions nor the legislation was submitted for preclearance under § 5.

Several newly elected county commissioners sued, alleging that the counties had violated § 5 by failing to obtain preclearance of these resolutions. This Court disagreed, holding that neither resolution constituted a change affecting voting. With respect to the Common Fund Resolution, the Court noted that "[c]hanges which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." 502 U.S. at 506. In addressing the transfer of power from the elected

official to the appointed county engineer, the Supreme Court distinguished *Bunton*, because the Unit System did not abolish an elective office, but merely transferred authority from an elected office to an appointed one. *Presley*, 502 U.S. at 506, 507.

Like the Common Fund Resolution in *Presley*, the provisions of Chapter 39 of the Texas Education Code allowing for the temporary placement of a master or management team have no direct relation to voting. In words directly applicable to this case:

> It has no connection to voting procedures: It does not affect the manner of holding elections, it alters or imposes no candidacy qualifications or requirements, and it leaves undisturbed the composition of the electorate. It also has no bearing on the substance of voting power, for it does not increase or diminish the number of officials for whom the electorate may vote. Rather, the [temporary appointment of either a master or management team with limited powers] concerns the internal operations of an elected body.

Presley, 502 U.S. at 503.

Like the Unit System in *Presley*, the temporary placement of a master of management team does not replace an elected official with an appointed one:

> [I]t might be argued that the delegation of authority to an appointed official is similar to the replacement of an elected official with an appointed one, the change we held subject to § 5 in *Bunton v. Patterson*. This approach, however, would ignore the rationale for our holding: '[A]fter the change, [the citizen] is

> prohibited from electing an officer formerly subject to the approval of the voters.' ... In short, the change in *Bunton v. Patterson* involved a rule governing voting not because it affected a change in the relative authority of various governmental officials, but because it changed an elective office to an appointive one.

Presley, 502 U.S. at 506-507 (citation omitted).

Even where a master or management team is placed, the elected board of trustees remains in existence and retains "substantial authority," including the power to set the total amount of the budget. TEX. EDUC. CODE § 39.131 (e)(3)-(6).[24] In addition, the transfer of authority to a master or management team is temporary. The elected board of trustees is not displaced during the time the master or management team is in place. A portion of their responsibilities is supervised by the master or management team for a limited time period until the problem is corrected. Moreover, under § 39.131(e), the Commissioner must evaluate the continued need for the master or management team every 90 days. Unless that evaluation indicates that continued appointment is necessary for effective governance of the district or delivery of instructional services, the appointment of the master or management team must be terminated. *Id.* Finally, a party that disagrees with the Commissioner's temporary appointment of either a master or management team with limited powers has a right to appeal the Commissioner's action to the district court of Travis County. TEX. EDUC. CODE § 7.057(d).

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[24] As did the Russell County Commission in *Presley*, the school board "retains substantial authority, including the power . . . to set . . . [the total amount of its] budget." 502 U.S. at 493.

DOJ concluded that §§ 39.131(a)(7) and (a)(8) as limited by § 39.131(e) are changes affecting voting that need to be precleared every time the Commissioner decides to utilize either provision. In so concluding, DOJ determined that the limitations of § 39.131(e) on the appointment of a master or management team "do not exempt the State from the holding in *Casias v. Moses*, because S.B. 1 still potentially allows for the 'takeover' of a school board such that the board cannot perform the functions that are its 'reason for being,'" *citing State of Texas v. United States*, 866 F.Supp. 20, 26 (D.C.C. 1994). J.S. App. 37a. DOJ's conclusion is incorrect for three reasons. First, the limitations contained in § 39.131(e) do not allow for a "takeover" of a school board, if by "takeover" is meant a permanent replacement of the elected school board with an appointed master or management team. Such a permanent replacement would violate Texas law. TEX. EDUC. CODE § 11.051(a) ("An independent school district is governed by a board of trustees who, as a body corporate, shall oversee the management of the district.").

Second, the court in *Casias* did not ever reach a decision on the merits concerning the predecessor provision, Chapter 35. Rather the court enjoined the State from appointing a management team, holding only that "the Court will grant the motion for preliminary injunction at this time and reserve a final determination on the merits until the parties have had an opportunity to fully present their views." Jt. App. 29. After the legislature repealed Chapter 35 and passed Chapter 39, and DOJ precleared §§ 39.131(a)(7) and (a)(8) as enabling legislation, the court dismissed the action as moot. Jt. App. 43-44. Thus, *Casias* does not bind the State as DOJ incorrectly asserted in its preclearance letter.

Finally, DOJ's "reason for being" standard has never been sanctioned by this Court.[25] Under this standard, any "change in the relative authority of various governmental officials" would be deemed to be election related. This result contradicts this Court's holding in both *Bunton v. Patterson*, 393 U.S. 544 (1969) and *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). The *Presley* Court explained that the change in *Bunton* "involved a rule governing voting not because it affected a change in the relative authority of various governmental officials, but because it changed an elective office to an appointive one." *Presley*, 502 U.S. at 506-507. Moreover, Texas law establishes a school board's "reason for being." Section 11.002 of the Texas Education Code states that "the school districts ... created in accordance with the laws of this state have the primary responsibility for implementing the state's system of public education and ensuring student performance in accordance with this code." Moreover, § 11.011 requires that "[t]he board of trustees of an independent school district, the superintendent of the district, the campus administrators, and the district--and campus--level committees ... shall contribute to the operation of the district in the manner provided by this code and by the board of trustees of the district in a manner not inconsistent with this code." If anything, the sanction provisions at issue assist the troubled school boards

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[25] The page cite to which DOJ refers in *State of Texas v. United States* reads as follows:

> Defendants assert that one simple fact compels this conclusion: There is only one Aquifer and its regulation is the "reason for being" for both of these boards. United States' Memorandum in Opposition to Texas' Motion for Summary Judgment at 14.

866 F.Supp. at 26. The court in *State of Texas v. United States* says nothing further about the use of the term "reason for being."

accomplish the goals that are their "reason for being:" to operate the school districts in a manner consistent with Texas law.

c. The principles of federalism support the conclusion that the temporary placement of a master or management team is not a change affecting voting.

Texas has enacted Chapter 39 of the Texas Education Code to fulfill its important responsibility to educate the children of the State. The sanctions provided in § 39.131(a), including the temporary placement of a master or management team, are intended to provide Texas with controls necessary to effectuate that responsibility.

Since § 5 of the Voting Rights Act was first held to be constitutional, members of this Court have expressed concern that it infringes upon the rights of states to govern their own affairs:

> Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.

South Carolina v. Katzenbach, 383 U.S. 301, 358 (1966) (Black, J., concurring and dissenting).

Recognizing this concern, the Court has restricted the scope of § 5 and has refused to extend it to "changes in the routine organization and functioning of government." *Presley*, 502 U.S. at 504. Education is a traditional function of state government. Congress has recently affirmed this basic precept

in the Goals 2000: Educating America Act, 20 U.S.C. §§ 5801 *et seq.*: "[I]n our Federal system the responsibility for education is reserved respectively to the states and the local school systems and other instrumentalities of the states." 20 U.S.C. § 5899(a)(3). To require Texas to preclear modest legislative efforts to safeguard the education of its children extends the Voting Rights Act into an area where it was never contemplated to be used:

> By requiring preclearance of changes with respect to voting, Congress did not mean to subject such routine matters of governance to federal supervision. Were the rule otherwise, neither state nor local governments could exercise power in a responsible manner within a federal system.
>
> ****
>
> If federalism is to operate as a practical system of governance and not a mere poetic ideal, the states must be allowed both predictability and efficiency in structuring their governments. Constant minor adjustments in the allocation of power among state and local officials serve this elemental purpose. Covered changes must bear a direct relation to voting itself . . .

Presley, 502 U.S. at 507-510. Here, the appointment of a master or management team bears "[no] direct relation to voting itself." *Id.* Rather, it is a minor, albeit episodic, adjustment in the allocation of power among state and local officials.

d. Federal law authorizes states, including Texas, to take corrective action against local school districts that are not meeting state educational goals.

The language of the Voting Rights Act, including § 5, makes clear that Congress intended that it apply only to affected states and subdivisions.[26] It does not apply to acts passed by the federal government.

In 1994, Congress passed the Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.* This Act revised, strengthened, and improved the Elementary and Secondary Education Act of 1965. In its declaration of policy, Congress emphasized the importance of education:

> The Congress declares it to be the policy of the United States that a high-quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and improve the life of every individual, because the quality of our individual

[26] Section 1973c of the Voting Rights Act provides in part that:

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be *imposed or applied by any State or political subdivision* in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . .

42 U.S.C. § 1973c (emphasis added). Section 5 requires that an affected state or subdivision seek preclearance of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

> lives ultimately depends on the quality of the lives of others.

20 U.S.C. § 6301(a)(1). J.S. App. 64a. In the Improving America's Schools Act, Congress authorized additional funds to help disadvantaged children meet enhanced educational standards. 20 U.S.C. §§ 6301(d), 6302. To be eligible for these funds, states are required to design both challenging performance standards and assessment systems to measure children's achievement under these standards. 20 U.S.C. § 6311(b); J.S. App. 69a-76a.

States receiving funds under this Act must measure students' performance. To assure progress towards educational goals, the Act specifically requires a state to identify any local educational agency[27] that fails to make adequate progress towards meeting the state's student performance standards for two years. 20 U.S.C. § 6317(d)(3)(A)(i); J.S. App. 82a. After a local educational agency has been so identified, the state may take corrective action against that local educational agency. 20 U.S.C. § 6317(d)(6)(A); J.S. App. 84a-86a. The state *must* take such action against an identified local educational agency that fails to make adequate progress after four years. *Id.*

Corrective actions range in severity, and may include (1) the withholding of funds; (2) reconstitution of school district personnel; (3) removal of particular schools from the jurisdiction of the local educational agency and establishment of alternative arrangements for public governance and supervision of such schools; (4) *appointment by the state educational agency of a receiver or trustee to administer the affairs of the local educational agency in place of the superintendent and*

[27] 20 U.S.C. § 5802(a)(6) provides that the definitions of the terms "local educational agency" and "state educational agency" are found at 20 U.S.C. §§ 8801(18)(A) and 8801(28), respectively. A Texas school district is a local educational agency. The Texas Education Agency, headed by the Commissioner of Education, is the state educational agency for the State.

school board; (5) the abolition or restructuring of the local educational agency; (6) the authorizing of students to transfer from a school operated by one local educational agency to a school operated by another local educational agency; and (7) a joint plan between the state and the local educational agency that addresses specific elements of student performance problems and that specifies state and local responsibilities under the plan. 20 U.S.C. § 6317(d)(6)(B)(i)(I)-(VII) (emphasis added). J.S. App. 84a-85a.

Federal law, therefore, requires states to take corrective action against local educational districts under certain circumstances. The corrective actions authorized under federal law are similar to the sanctions authorized by § 39.131(a) of the Texas Education Code. In fact, federal law allows for the *replacement* of a school board, as well as abolition of a school district, both of which are more draconian then the modest sanctions at issue here. 20 U.S.C. § 6317(d)(6)(B)(i)(V), (VI); J.S. App. 85a. If a school district fails to make adequate progress towards meeting the state's educational performance standards, both the Texas and federal statutes provide for the appointment of a receiver or trustee to administer the affairs of a school district.

e. Federal law authorizes Ed-Flex Partnership states, including Texas, to substitute their accountability regulations for those of the federal statutes.

Further, Congress has recently passed legislation which enables states to substitute their own assessment and accountability provisions for those of the federal statutes. In 1994, Congress passed the Educational Flexibility Partnership Demonstration Act ("Ed-Flex") as part of the Goals 2000: Educating America Act ("Goals 2000"), 20 U.S.C. § 5801 *et seq*. The Goals 2000 Act is intended to promote educational

reform leading to improved educational outcomes by, among other things, "encouraging and enabling all State educational agencies and local educational agencies to develop comprehensive improvement plans. . ." 20 U.S.C. § 5801(6)(C); J.S. App. 50a.

In the Goals 2000 Act, "Congress agrees and reaffirms that the responsibility for control of education is reserved to the States and local school systems and other instrumentalities of the States. . ." 20 U.S.C. § 5899(b). Moreover, the Act expressly provides that the federal government shall take no action under the Act "which would reduce, modify, or undercut State and local responsibility for control of education." *Id.*

This emphasis on state control of education is further demonstrated by the Ed-Flex portion of the Act. 20 U.S.C. § 5891; J.S. App. 52a-63a. Ed-Flex provides that the Secretary of Education may authorize state educational agencies in eligible states to waive federal statutory or regulatory requirements applicable to certain federal programs. 20 U.S.C. § 5891(e)(2); J.S. App. 57a. One of the programs whose statutory requirements can be waived is Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*, which includes the corrective actions discussed above. 20 U.S.C. § 5891(b)(1); J.S. App. 55a.

A state may apply to become an Ed-Flex Partnership state. 20 U.S.C. § 5891(e)(4)(A); J.S. App. 58a-59a. If a state is designated as an Ed-Flex partner, it may waive federal education regulations and statutory requirements, and replace them with its own regulations. 20 U.S.C. § 5891(e)(4)(B)(ii); J.S. App. 59a. Federal regulations that may be waived include those pertaining to accountability. 20 U.S.C. § 5891(b)(1); J.S. App. 55a.

Texas has been selected as one of seven Ed-Flex Partnership states, allowing it to waive certain provisions of federal law, including the corrective actions listed in Title I of the Elementary and Secondary Education Act of 1965. 20 U.S.C. § 6317(d)(6)(B)(i)(I)-(VIII); J.S. App. 84a-85a. *See*

Letter from Richard W. Riley, Secretary, United States Department of Education, to Michael A. Moses, Commissioner of Education, with attachments (Jan. 26, 1996); J.S. App. 39a-48a. In his letter selecting Texas as an Ed-Flex Partnership state, Secretary Riley noted that "Texas has demonstrated its commitment to promoting flexibility, accountability, and effective innovation in order to improve teaching and learning." J.S. App. 39a. Secretary Riley further expressed "confiden[ce] that Texas, as an Ed-Flex Partnership state, will exercise its authority in a manner that furthers the objectives of its comprehensive plan for educational improvement and provides accountability for results." *Id.*

Texas has used the Ed-Flex waiver process to conform the federal grant of authority for corrective actions to the provisions of its state authorization under Chapter 39 of the Texas Education Code. Thus, Texas has *pursuant to federal authorization* precisely the same authority it enjoys under state law. In conforming the federal grant of corrective action authority to Chapter 39, Texas also adopted the limits on the authority of a master or management team precluding any action affecting voting or elections found at § 39.131(e); J.S. App. 91a-92a.

Because a federal statute authorizes Texas to use its own accountability program, the Voting Rights Act does not apply to actions taken pursuant to that accountability program. To hold otherwise would subvert the intent of the Voting Rights Act and apply it in a manner never contemplated by Congress. To hold otherwise would prevent Texas from exercising its power in a responsible manner within the federal system, and would defeat the purpose of the federal education statutes. The power to appoint a master or management team would most often be invoked in emergency situations where swift action is required to protect the education of Texas children. In the time it takes to seek and obtain preclearance, the master or management team could have been appointed, corrected the

problem, and been removed.[28] To require Texas, unlike states not covered by the Voting Rights Act, to seek preclearance in these situations could result in the very harm to education that the federal statutes are intended to prevent.

2. Hardship to the parties

Texas satisfies the "hardship" prong of the *Abbott Laboratories* test because Texas' hardship is the heavy cost to "our federalism" that inures by having DOJ insinuate itself into routine matters of state governance that have nothing to do with election changes. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). Because § 5 of the Voting Rights Act imposes a heavy burden on state sovereignty, *Allen v. State Board of Elections*, 393 U.S. 544, 556 (1969) ("Congress . . . drafted an *unusual*, and in some respects a *severe*, procedure for insuring that states would not discriminate on the basis of race in the enforcement of their voting laws" (emphasis added)), states are not required to seek preclearance if the legislation at issue does not affect voting. "Section 5 [of the Voting Rights Act] is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992). This Court should not allow DOJ's erroneous determination as to the scope of § 5 of the Voting Rights Act to stand.

Moreover, this Court's holding in *Morris v. Gressette*, 432 U.S. 491(1977) does not preclude judicial resolution of this

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[28] For instance, in the recent situation involving the Wilmer-Hutchins school district, Texas sought to preclear placement of a management team on March 10, 1996. Sixty days later, on May 10, 1996, the DOJ sought additional information. DOJ finally precleared the placement on June 6, 1996, on an "expedited" basis, approximately ninety (90) days after Texas sought preclearance. During that time, both the Internal Revenue Service and the Federal Bureau of Investigation had raided the district's offices to investigate financial wrongdoing.

issue. In *Gressette*, this Court held that the Attorney General's failure to object timely to a state's reapportionment plan could not "be questioned in a suit seeking judicial review of the Attorney General's exercise of discretion under § 5 or his failure to object within the statutory period." *Id.* at 506-507. This Court reasoned in so holding that "where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation." *Id.* at 506-07.

This case differs from *Gressette* in several important respects. First, in *Gressette* no one disputed that the state redistricting legislation involved there was a change affecting voting. Here, the gravamen of the dispute concerns Texas' disagreement with DOJ that §§ 39.131(a)(7), (a)(8), and (e) are changes affecting voting.

Second, without judicial review, an erroneous determination by DOJ that a state statute is a change affecting voting would never be corrected. In essence, DOJ could expand the boundaries of § 5 by broadly defining a change affecting voting and requiring a state to submit the statutory provisions for administrative preclearance. In *Gressette*, the Court reasoned that DOJ's erroneous failure to object to legislation that affected voting could be judicially corrected in a later suit. Here, no such safeguard would exist without recourse to judicial review.[29]

Third, the severe nature of the § 5 remedy supports judicial resolution. The *Gressette* Court acknowledged "that Congress intended to provide covered jurisdictions with an

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[29] In fact, DOJ argued to the district court that it (the district court) could not unpreclear the Attorney General's administrative decision to preclear Chapter 39 of the Texas Education Code as enabling legislation. United States' Memorandum in Support of Motion to Dismiss, or in the Alternative, for Judgment on the Pleadings at 10. Apparently, DOJ would be very content on being the only arbiter of whether a state provision is a change affecting voting.

expeditious alternative to declaratory judgment actions" by allowing covered jurisdictions the option of pursuing the ostensibly quicker route of administrative preclearance by the Attorney General. *Gressette*, 432 U.S. at 504. However, Congress certainly could not have intended to deny states the opportunity to have the issue of whether a statutory provision is a change affecting voting decided by the courts as opposed to DOJ. Without a judicial determination that the statute is not subject to the Voting Rights Act, Texas will be obliged to submit any temporary placements of a master or management team for preclearance. Texas would be denied its right to administrate the education of Texas' children, a matter firmly within the ambit of state regulation, unencumbered by unwarranted intrusion by DOJ.

This case is similar to *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992), in which this Court refused to defer to the DOJ's interpretation of the scope of § 5. In *Presley*, the Court considered whether the permanent delegation of authority from an elected to a appointed official constituted a change with respect to voting. The DOJ argued that it did, and urged the Court to defer to the DOJ's administrative construction of § 5. This Court refused to do so. Noting that "[d]eference does not mean acquiescence," *id.* at 508, this Court emphasized that Congress' intent as to the scope of § 5 is unambiguous: § 5 applies *only* to changes affecting voting. *Id.* at 509 (emphasis added).

This Court has recently expressed concern about DOJ's expansive interpretation of § 5 of the Voting Rights Act. In *Miller v. Johnson*, 115 S. Ct. 2475 (1995), the Court refused to accord deference to DOJ's interpretation of the scope of § 5 of the Voting Rights Act, noting that DOJ's "maximization policy requiring States to create majority-minority districts wherever possible," was far removed from "the purpose of § 5." *Id.* at 2493.

In a case decided last term, Justice Thomas emphasized the importance of independent judicial examination of cases under § 5:

> Section 5 sets up alternative routes for preclearance, and the primary route specified is through the District Court for the District of Columbia, not through the Attorney General's office. See 42 U.S.C. § 1973c (generally requiring District Court preclearance, with a proviso that covered jurisdictions may obtain preclearance by the Attorney General in lieu of District Court preclearance, but providing no authority for the Attorney General to preclude judicial preclearance.) Requiring the District Court to defer to adverse preclearance decisions by the Attorney General based upon the very preclearance standards she articulates would essentially render the independence of the District Court preclearance route a nullity.

Reno v. Bossier Parish School Bd., 117 S.Ct. 1491, 1504 (1997) (Thomas, J., concurring). While *Bossier Parish* involved a question of whether a redistricting plan should be precleared under § 5, there is an even greater need for independent judicial determination of whether a state enactment is subject to § 5 preclearance at all. A state should not be required to seek administrative preclearance of a specific placement of a monitor or management team before it can obtain a judicial determination of whether the statute in question is a change affecting voting. Such a result would hamper state sovereignty and violate fundamental tenets of federalism. As in *Miller*, the federalism costs exacted by § 5 preclearance can not be justified under the circumstances of this case. *Miller*, 115 S.Ct. at 2493.

CONCLUSION

For the reasons stated, Texas asks this Court to reverse the judgment of the court below and to render a decision on the merits: one that declares that TEX. EDUC. CODE §§ 39.131(a)(7), (a)(8), as limited by (e), are not changes affecting voting and, therefore, do not have to be submitted for preclearance under § 5 of the Voting Rights Act.

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